STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID THORNTON,

Defendant-Appellant.

UNPUBLISHED
June 17, 2003

No. 237030
Wayne Circuit Court
LC No. 00-012778-01

Before: Griffin, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to nine to twenty years' imprisonment for the assault conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first argues that the trial court erred in failing to allow for the inference that a missing witness' testimony would have been unfavorable to the prosecution, where the prosecution failed to exercise due diligence in attempting to produce the endorsed witness for trial. See CJI2d 5.12 (missing witness instruction). The trial court rejected this argument below, determining that the witness could not be produced despite the exercise of due diligence.

"A trial court's determination of due diligence will not be overturned on appeal absent an abuse of discretion." *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). That determination involves resolution of factual matters, and the court's factual findings will not be reversed unless clearly erroneous. *Id.*

If a prosecutor endorses a witness under MCL 767.40a, he is obliged to exercise due diligence to produce that witness at trial. *People v Wolford*, 189 Mich App 478, 483-484; 473 NW2d 767 (1991); *People v Jackson*, 178 Mich App 62, 65; 443 NW2d 423 (1989). If a prosecutor fails to produce an endorsed witness, he may be relieved of the duty by showing that the witness could not be produced despite the exercise of due diligence. *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000); *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). Due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of a witness. *Cummings, supra* at 585.

In this case, the evidence demonstrated that exhaustive efforts were made to locate the witness. The police checked the witness' last known address, questioned the witness' family and relatives, checked with local jails, hospitals, utility companies, and the post office, checked the witness' last place of employment, and ran a LEIN check. Unlike the situation in *People v Bean*, 457 Mich 677; 580 NW2d 390 (1998), on which defendant relies, there is no indication here that the police failed to follow up on known leads. The trial court did not abuse its discretion in determining that due diligence was shown.

Next, defendant argues that resentencing is required because the trial court failed to give defense counsel an opportunity to comment on the sentence defendant should receive, contrary to MCR 6.425(D)(2)(c). We disagree. Whether MCR 6.425(D)(2)(c) was violated is a question of law that this Court reviews de novo. *People v Petit*, 466 Mich 624, 627; 648 NW2d 193 (2002).

MCR 6.425(D)(2)(c) provides:

> (2) The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law. At sentencing the court, complying on the record, must:
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> * * *
>
> (c) give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence.

In *Petit, supra* at 628, our Supreme Court held that the court rule does not require a trial court to specifically ask a defendant if he wishes to allocute, but must merely provide an opportunity to allocute. In *Petit*, the defendant's attorney allocuted on the defendant's behalf, and the victim's daughter also spoke to the court. *Id*. at 626. The trial court then asked if there was "anything further" before it imposed sentence, and the defense attorney said "no." *Id*. at 628. The Supreme Court held that this was sufficient to satisfy MCR 6.425(D)(2)(c). *Petit, supra* at 629.

Similarly, in this case, after addressing and disposing of matters concerning the scoring of the sentencing guidelines, the trial court expressly asked defense counsel whether there was "anything else." Counsel proceeded to discuss the subject of sentence credit, requesting that defendant be awarded additional credit, which the trial court granted. We are satisfied that defense counsel was afforded an adequate opportunity to advise the court of circumstances the court should consider in imposing sentence. MCR 6.425(D)(2)(c). Resentencing is not required.

Next, defendant argues that the trial court erred in scoring the legislative sentencing guidelines when it scored five points for prior record variable (PRV) six. Under PRV six, five points are to be scored if, at the time of the offense, the offender was on probation. MCL 777.56(1)(d). Here, the prosecutor produced a LEIN report reflecting defendant's probationary status for the misdemeanor offense of driving with a suspended license. This was sufficient to support the score of five points for PRV six. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We disagree with defendant's argument that driving with a suspended license is not the type of offense for which a prior probationary term may be scored under PRV

six. Cf. *People v Kisielewicz*, 156 Mich App 724, 727; 402 NW2d 497 (1986). We also reject defendant's argument that PRV six should not have been scored because the prosecution failed to prove that defendant was represented by counsel, or properly waived counsel, in the suspended license proceeding. That determination was immaterial because there was no indication that a term of incarceration was imposed for the prior offense, see *Nichols v United States*, 511 US 738, 746-748; 114 S Ct 1921; 128 L Ed 2d 745 (1994), and, more significantly, it was defendant's probationary status, not the validity of a prior conviction, that formed the basis for the scoring of PRV six.

Next, defendant argues that reversal is required because the trial court failed to consider the lesser offense of assault with intent to do great bodily harm less than murder. We disagree. Defendant did not preserve this issue by requesting that the court consider this lesser offense. Reviewing this issue under the plain error rule applicable to unpreserved issues, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), it is apparent that appellate relief is not warranted. The principal issue at trial was whether defendant acted in self-defense, which was the defense raised by defendant. Considered in this context, the court's failure to expressly consider the lesser offense of assault with intent to commit great bodily harm less than murder was not plain error. Further, evidence was presented at trial that, shortly after a confrontation between defendant and the victim, the two exchanged words and defendant fired numerous shots at the victim, hitting him in the back of his head and in the back. Witnesses testified that the victim was unarmed and did not appear to physically threaten defendant. Viewed in a light most favorable to the prosecution, the evidence was sufficient to support the trial court's determination that defendant was guilty of assault with intent to commit murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Accordingly, we find no merit to this claim of error.

Finally, we reject defendant's claim that he was denied the effective assistance of counsel. To establish a claim of ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that prejudice resulted. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). To demonstrate prejudice, a defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.*

Defendant first argues that counsel was ineffective because he failed to show a surveillance video or discuss the video with defendant before trial. However, the record indicates that counsel did in fact review the tape, inasmuch as he argued at trial that it showed people coming and going and that someone had removed a weapon from the victim. Thus, the record does not support defendant's claim in this regard. Defendant also fails to establish prejudice.

Defendant also contends that counsel was ineffective because he failed to object when the prosecutor failed to list a known res gestae witness, contrary to MCL 767.40a. That statute requires the prosecutor to attach to the filed information a list of all known res gestae witnesses and all witnesses whom the prosecutor intends to call at trial. MCL 767.40a(1). We find that defendant fails to establish prejudice even if the individual identified as John-John should have been listed, especially where defendant's own affidavit indicates that John-John was present in the courtroom during trial.

Defendant also contends that counsel erred in failing to investigate and present other disinterested witnesses based on the surveillance videotape. When claiming ineffective assistance due to counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). The failure to interview witnesses does not alone establish inadequate preparation. *Id.* at 642. It must be shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused. *Id.* Also, decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court generally will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Id.* at 76-77. Defendant's argument constitutes pure speculation, fails to establish prejudice, and does not overcome the presumption that counsel's decisions were a matter of sound trial strategy.

Defendant also argues that counsel erred by failing to ask the court to consider a lesser offense. However, it was a sound strategical decision to argue self-defense rather than any lesser offenses. That this strategy failed does not indicate that counsel was ineffective. *In re CR*, 250 Mich App 185, 199; 646 NW2d 506 (2001).

Finally, defendant argues that counsel erred by failing to present evidence at sentencing that he was not on probation at the time the offense was committed. However, defendant provides no official documentation in support, and there was documentation presented at sentencing reflecting that defendant was on probation. We are left with no basis for concluding that counsel was ineffective.[1]

Affirmed.

/s/ Richard Allen Griffin
/s/ William B. Murphy
/s/ Kathleen Jansen

[1] We also reject defendant's request to remand for a *Ginther* hearing, which is unnecessary in light of our rulings above.